FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 46

RICHFIELD OIL CORPORATION,
a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

APPELLEE'S BRIEF

ROBERT W. KENNY,
Attorney General of the
State of California,

JOHN L. NOURSE,
Deputy Attorney General of the
State of California,
Counsel for Appellee.

42960 PRINTED IN CALIFORNIA STATE PRINTING OFFICE

INDEX

	Page
STATEMENT OF THE CASE	1
THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. The Commerce Clause Does Not Prevent the Levy of the Tax	6
II. Sales Consummated Within the Borders of the Seller's State Should be Subject to Local Taxation Whether the Goods Thereafter Move in Interstate or Foreign Commerce	9
III. A Non-discriminatory Tax on a Local Sale is Neither a Duty nor an Impost on Exports Even if the Purchaser Exports the Goods	15
IV. The Constitutional Convention	18
V. Cases Dealing With the Taxation of Exports by the States	20
VI. Cases Involving the Taxation of Exports by the United States and Their Relation to the Commerce Clause Cases	25
VII. Cases Involving the Taxation of Imports by the States	33
CONCLUSION	39

TABLE OF AUTHORITIES CITED

CASES

	Page
Adams Manufacturing Co. v. Storen, 304 U.S. 307	10, 17, 23
Almy v. California, 24 How. 169	20
American Manufacturing Co. v. St. Louis, 250 U.S. 459	27
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 238	34, 36
Austin v. Tennessee, 179 U.S. 343	33
Bacon v. Illinois, 227 U.S. 504	29
Banker Brothers v. Pennsylvania, 222 U.S. 210	29
Blount v. Munroe (1878), 60 Ga. 61, 68	24
Brown v. Houston, 114 U.S. 622, 629	21, 24
Brown v. Maryland, 12 Wheat. 419	33
Burke v. Wells, 208 U.S. 14	33
Carson Petroleum Co. v. Vial, 279 U.S. 95, 166-168	30
Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366	30
Clark v. Williard, 292 U.S. 112	3
Clarke v. Clarke (1877), 3 Woods 408, Fed. Case No. 2846	24
Coe v. Errol, 116 U.S. 517	10, 16, 21, 24, 38
Cook v. Pennsylvania, 97 U.S. 566	34, 36
Cornell v. Coyne, 192 U.S. 418	27
Crew Levick v. Pennsylvania, 245 U.S. 292	10, 17, 21, 23
De Aryan v. Akers, 12 Cal. 2d 781; 87 Pac. 2d 695	15
Department of Treasury v. Wood Preserving Corp., 313 U.S. 62	6, 33
Fairbank v. United States, 181 U.S. 283	21, 26
Felt and Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62	16
Gulf Fisheries v. MacInerney, 276 U.S. 124	33
Hooven & Allison Co. v. Evatt, 324 U.S. 652	14, 33, 37
Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469	30
International Harvester Co. v. Department of Treasury, 322 U.S. 340	6
Joseph v. Carter & Weekes Stevedoring Co. No. 29, October, 1946, term	33
Krauter v. Menchacattorre, 195 N.Y.S. 361, 363	38
Low v. Austin, 13 Wall. 29	14, 33
May v. New Orleans, 178 U.S. 496	33
Minnesota v. Blasius, 290 U.S. 1, 8	38

Page

Morrison-Knudson Co. v. State Board of Equalization, 58 Wyo. 500; 135 Pac. 2d 927, 933 11
McGoldrick v. Berwind-White Coal Mining Company, 309 U.S. 33, 46 13
McLeod v. Dilworth, 322 U.S. 327 11
National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. 2d 283; 79 Pac. 2d 380 15
Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 32
Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U.S. 336 ..... 27, 29
Robbins v. Shelby County, 120 U.S. 489 26
Sonnenborn Bros. v. Curetop, 262 U.S. 506 36
Spalding Bros., A. G. v. Edwards, 280 U.S. 66 ..... 10, 12, 27, 31
Superior Oil Co. v. Mississippi, 280 U.S. 390 ..... 6, 28, 31
Susquehanna Coal Co. v. South Amboy, 228 U.S. 665 29
Texas & New Orleans R. R. Co. v. Sabine Tram Company, 227 U.S. 111 ..... 27, 29
Thames and Mersey Ins. Co. v. United States, 237 U.S. 19 26
Turpin v. Burgess, 117 U.S. 504 25
United States v. Hvoslef, 237 U.S. 1 26
Waring v. The Mayor, 8 Wall. 110 ..... 33, 38
Welton v. Missouri, 91 U.S. 275 34
Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156; 78 Pac. 2d 731; 117 A. L. R. 838 15
Western Livestock v. Bureau of Revenue, 303 U.S. 250 33
Woodruff v. Parham, 8 Wall. 123 ..... 18, 20

STATUTES

California Retail Sales Tax Act, Sec. 2b 16
California Retail Sales Tax Act, Sec. 8½ 15
California Retail Sales Tax Act, Sec. 21 2

MISCELLANEOUS

Sales Tax Rules and Regulations No. 26 ..... 10, 16

TEXTBOOKS

12 Wheat. 419, 442 36
38 Harv. L. R. 858 37
A Constitutional Source of National Revenue Impaired, 29 Harv. L. R. 469 26
Farrand: The Record of the Federal Convention 18
The Federalist No. 42 18

In the Supreme Court
of the
UNITED STATES

OCTOBER TERM, 1946

No. 46

RICHFIELD OIL CORPORATION,
a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

STATEMENT OF THE CASE

The statement of the case contained in Appellant's Brief is accurate, but the essential facts are stated here for convenience.

Under date of February 4, 1937, the Appellant entered into a contract for the sale of two cargoes of fuel oil to the Government of New Zealand. The contract called for delivery to the New Zealand naval tanker "*Nucula*" at Los Angeles. Delivery of the second cargo was made pursuant to the contract at Los Angeles on May 14, 1937. On May 15, 1937, the *Nucula* sailed for Aukland, New Zealand.

On September 25, 1940, a notice of assessment covering sales made during the period from April 1,

1937, to March 31, 1940, was issued to the taxpayer. The receipts from the sale of the second cargo were included in the assessment along with other items, but the receipts from the sale of the first cargo were omitted since delivery, which was made on March 15, 1937, preceded the period covered by the assessment.*

In due course the Appellant paid the tax on the receipts from this sale and filed a claim for refund. Upon denial of its claim it filed suit to recover the sum in the California Superior Court. The case was tried upon a stipulation of facts and judgment was entered for the taxpayer. The State appealed and the judgment was affirmed (155 Pac. 2d 1). A rehearing was granted and the judgment was reversed. (27 Adv. Cal. 150; 163 Pac. 2d 1.)

It was the view of the Trial Court that the tax was a burden on commerce and a duty on exports. In its first opinion the California Supreme Court relied upon the export-import clause alone. In reversing the judgment the Supreme Court held that the State was not precluded from taxing the transaction by either clause.

In its assignments of error, Appellant relies only upon the export-import clause.

* Apparently the assessment on the first cargo was barred by the Statute of Limitations before the facts were discovered: Retail Sales Tax Act, Section 21; Revenue and Taxation Code, Section 6487.

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION

The tax involved in this case was assessed upon a transaction substantially identical with other transactions involving Appellant or other oil companies as the seller and the Government of New Zealand or other governments as the purchaser. The taxes involved in the other cases, including interest and penalties, now aggregate approximately $2,500,000.

The State is, therefore, satisfied that if this appeal were dismissed without a determination on the merits either Appellant or one of its competitors would eventually bring the questions of constitutional law involved before the Court in this or some similar proceeding. The sale involved in this case occurred in May, 1937, and the State could hardly gain by any further delay. Accordingly, we desire to have an immediate determination on the merits and have raised the jurisdictional question only because we conceive it to be our duty to do so.

In *Clark* v. *Williard*, 292 U.S. 112, the judgment was reversed "for further proceedings in accordance with the opinion." The judgment of the California Supreme Court contained no such direction.

It is true that if the case were returned to the Trial Court it should grant a motion for judgment on the pleadings, and it is also true that, in view of the concessions contained in Appellant's Brief that it

would undoubtedly do so. But it would nevertheless be acting judicially in doing so.

The Trial Court would not be acting under the compulsion of a direction of the California Supreme Court in granting such a motion. It would merely be applying the doctrine of the law of the case—a legal principle which, like the doctrine of *stare decisis*, is sometimes applied with reservations.

Appellant cites no case which holds that a judgment of a state court is final when it merely remands a case for a new trial even though an examination of the record shows that it is unlikely that the case could be finally determined upon non-federal grounds. We are not prepared to state that there is an independent ground upon which the cause might be determined, but we do not understand that the jurisdiction of this Court depends upon whether or not independent points could be raised upon a new trial.

If such were the rule this Court would be compelled to examine the record in each case and determine for itself whether under local rules of pleading and practice there is a reasonable prospect that the case might be disposed of upon non-federal grounds. We assume that it is for this reason that the Court has thus far declined to assume jurisdiction of an appeal where a reversal by a state appellate court merely served to open the way for further judicial action by a trial court.

SUMMARY OF THE ARGUMENT

It is established that a tax upon a retail sale consummated by delivery within the borders of the seller's State does not burden commerce. The same rule applies to exports.

The proposition that a nondiscriminatory tax on such a local sale or upon the privilege of selling at retail is no more a duty on exports than it is a burden on commerce is supported by the debates in the Constitutional Convention and by the decisions of this Court. The contrary argument is based on an attempted analogy to cases applying the original package doctrine to imports. That doctrine is artificial; no similar artificial doctrine has ever been applied to exports and there is no sound reason why it should be.

Appellant's attempt to establish that the export had begun prior to the delivery and that the sale was an export sale rests upon decisions dealing with the power of the Federal Government to regulate commerce rather than with the power of the States to levy taxes on local events which are closely related to commerce. The cases dealing with the taxation of sales hold that sales of the character of the sale involved here are local and these cases are controlling.

ARGUMENT

I. The Commerce Clause Does Not Prevent the Levy of the Tax

The taxpayer does not rely upon the commerce clause in this Court.[1] Apparently, therefore, it accepts the proposition that the commerce clause does not preclude the taxation of a transaction consummated by delivery within the borders of a State in which the seller does business, even if the goods are thereafter moved in foreign commerce.

The transaction involved in the case at bar is essentially the same as those involved in *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; *Department of Treasury* v. *Wood Preserving Co.*, 313 U.S. 62; and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (Class "D" sales), and it is apparent that these cases are controlling, at least as respects the application of the commerce clause.

In the *Superior Oil* case oil was delivered to the purchaser on the docks at Biloxi, Mississippi, but it was consigned to the purchaser at a point in Louisiana and was immediately loaded on the purchaser's vessels and taken out of the harbor.

In the *Wood Preserving* case railroad ties were loaded on freight cars belonging to the purchaser and

[1] The Trial Court concluded that the tax was invalid under the commerce clause as well as under the export-import clause (R.p.65). Appellant raised the point in its claim for refund (R.p.15) and in its complaint (R.p.9). It continued to press the point in its briefs in the California Supreme Court and it was discussed in that court's opinion (R.pp.87,97). However, the assignments of error are limited to the application of the export-import clause.

were immediately shipped out of Indiana to Ohio for processing in the seller's plant.

In the *International Harvester* case (Class "D" sales) residents of Illinois came into the State of Indiana and took delivery of trucks which they immediately drove to Illinois for use there.

In each of the three cases the Court held that the sale was a local sale; that it was not an interstate sale at all and that the tax did not burden interstate commerce. Appellant, although not relying upon the commerce clause, attempts to distinguish these cases on their facts.

It emphasizes the fact that in the case at bar the contract contemplated that the purchaser would remove the oil from the State and that the oil was actually exported. But in each of the cases cited there was also such a contract and the goods were later removed from the State. Appellant also points to the fact that in the case at bar delivery was accomplished by loading the oil on the purchaser's vessel, but it will be seen that the *Wood Preserving* case differs only in that delivery was accomplished by loading the ties on the purchaser's railroad cars.

It is also argued that in the case at bar it was certain that the oil would be transported without the State of California and it is inferred that this was not so in the cases cited. Actually there was no more likelihood that the ties sold by the Wood Preserving Company would be diverted to a point in Indiana than there was that the oil sold to the Government of

New Zealand would be transhipped to another vessel in Los Angeles Harbor or at sea or that it would be diverted to San Diego or San Francisco. The Wood Preserving Company might have had a cause of action against the Baltimore and Ohio Railroad if it had diverted the ties, for the contract contemplated that the ties would be returned to it in Ohio for treatment, but Appellant would have had no ground for complaint if the Government of New Zealand had diverted the oil. It lost all interest in the oil when it loaded it on the "*Nucula.*" From that point on it was interested only in receiving payment of the purchase price.

In the last analysis, therefore, Appellant's argument is reduced to the proposition that this transaction is not taxable, although the State would have been free to tax a similar sale of fuel oil if it had been delivered to a tanker owned by the purchaser for transportation to Seattle or New York.

Furthermore, Appellant apparently would contend that a different result would have been reached in the *Wood Preserving Co.* case if the ties had been purchased by a Canadian railway which took the ties to Ontario for treatment; that the *International Harvester Company* case would have been decided differently if the trucks had been driven to Canada instead of Illinois and that a different result would have been reached in the *Superior Oil* case if the purchasers had been Mexican fishermen and if the oil had been consigned to a Mexican port.

This Court has held that the sales involved in those cases were local sales. Appellant argues that the sale involved in the case at bar was an export sale. It asks the Court to hold, therefore, that a sale made in California is local (and not interstate) if the purchaser takes the goods to Vancouver, Washington, and that an identical transaction is foreign (and not local) if the purchaser takes the goods to Vancouver, British Columbia.

The power of the State to tax is measured by what is done within its borders. It is not affected by what the purchaser thereafter does with goods which he has purchased locally.

II. Sales Consummated Within the Borders of the Seller's State Should Be Subject to Local Taxation Whether the Goods Thereafter Move in Interstate or Foreign Commerce

The rule that a sale consummated by delivery in the State in which the seller is located is subject to taxation by the seller's State rests upon sound policy. In the case of interstate commerce, there is no danger that the sale itself would be subjected to a second tax by the State in which the buyer uses the property. It is equally clear that any other rule would cause serious difficulties in the administration of local sales taxes. If a tourist buying jewelry were exempt from taxes on purchases which he made while visiting in a State, local residents might claim to be tourists. The same administrative difficulties would be encountered

if out-of-state businessmen were free to send their trucks, or railroad cars or ships into the State to take possession of goods purchased from local vendors.

There are also important differences from the legal standpoint. Both buyer and the seller are within the jurisdiction of the taxing State. And the delivery is accomplished in exactly the same manner as it is in a transaction in which the ~~taxpayer~~ purchaser intends to retain the goods in the taxing State after he has accepted delivery.

A further practical consideration is that the great bulk of goods are moved across state lines by common carrier and that therefore, a tax on sales consummated by actual delivery within the State will not affect the great flow of commerce.

For these reasons the California State Board of Equalization has insisted upon the right of the State to tax sales consummated by delivery to the purchaser within the State, whether the purchaser intended to take the goods out of the country or merely across a State line. But the Board has made no attempt to reach sales where the delivery was made to a common carrier or forwarding agent within the State.[2] No distinction has been made between sales in interstate commerce and sales in foreign commerce.

The administrative ruling exempting sales where delivery made is to common carrier is based upon the theory that the Constitution precludes the taxation of such sales.[3] The California Sales Tax Law itself

[2] Sales Tax Rules and Regulations No. 26 printed in appendix "B."

[3] See *Coe* v. *Errol*, 116 U.S. 517.; *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292; *A. G. Spalding Bros.* v. *Edwards*, 262 U.S. 66; *Adams Manufacturing Co.* v. *Storer*, 304 U.S. 307.

makes transfer of title or possession the test and, as Appellant points out, the law would by its terms apply to sales where delivery was made to a common carrier. However the ruling has not been changed in spite of suggestions that *McLeod* v. *Dilworth*, 322 U.S. 327, opens the way to the taxation of such transactions.[4]

Appellant's suggestion that the decision of the California Supreme Court rests upon the sole ground that title passed in the State is therefore in error. There was a transfer of both title and possession in this case and the Court's decision goes no further than to hold that such a transaction is taxable.

The test which Appellant proposes is "certainty of export." The inherent uncertainties in such a test are demonstrated by Appellant's own inability to say upon which side of the line cases such as the *Wood Preserving* case would fall.

There are also sound practical objections to declaring that as a matter of constitutional law taxability depends upon the place where title passes under the law of sales.[5] These practical difficulties are avoided by applying the rule that sales consummated by delivery in the seller's State are subject to taxation even if the goods thereafter move in interstate or foreign commerce.

---

[4] But see *Morrison-Knudsen Co.* v. *State Board of Equalization*, 58 Wyo. 500; 135 Pac. 2d 927, 933.

[5] See the dissenting opinion of Mr. Justice Rutledge in *McLeod* v. *Dilworth*, supra, 322 U.S. 327, 349.

Appellant argues that the difference between delivery to a common carrier and delivery to the purchaser is not substantial, and that the export of the oil began with the loading of the ship. But this Court has already drawn the line. This Court has held that where the purchaser comes into the State to take delivery a tax on the sale is not a regulation of commerce,[6] but that where delivery is made to a carrier the tax is invalid.[7] In drawing the line it has also expressly noted that the two transactions are much alike, but it has concluded that the distinction is sufficient to require a difference in treatment.

Appellant also points out that the prohibition of the export-import clause is absolute and that there is no express prohibition on the taxation of interstate commerce. This argument involves the patently erroneous assumption that every tax which is a regulation of foreign commerce is necessarily a duty on imports or exports, and that there must be some export duties which do not constitute regulations of commerce.

It is contended that here the taxable event occurred after commerce had begun; that the export began with the movement of oil to the docks. But in its claim for refund, which Appellant concedes is binding upon it,[8] it stated that the oil was loaded onto the tanker on May 14, 1937, and that it "was thereafter duly exported on May 15, 1937 from Long Beach, Cali-

[6] *Superior Oil Co.* v. *Mississippi*, supra.
[7] *A. G. Spalding Bros.* v. *Edwards*, 262 U.S. 66.
[8] App. Op. Brief, pp. 9-10.

fornia to Auckland, New Zealand * * *." (R., p. 13.)

This is an accurate statement of what happened. The oil was exported by the purchaser the day after it was loaded upon its vessel.

Appellant also emphasizes the fact that in this case it loaded the oil on the vessel and argues that the process of loading was part of the process of exportation. While the record does not disclose the manner in which the oil was loaded, it appears likely that it flowed by gravity through pipes owned by the taxpayer into the purchaser's vessel. If this feature were important a different result would be reached if the materials sold were lifted from the dock by winches on the purchaser's vessel. This would be in substance saying that when the purchaser picks up the merchandise the sale can be taxed, but that it can not be taxed if the seller hands it to him. The most vulnerable point of the argument is that the thing taxed is the passage of title, not the loading of the vessel. The fact that title passes upon loading is a mere happenstance which can not effect the taxability of the transaction.

Finally, Appellant attempts to avoid the rule laid down in the commerce cases by stating that their real basis is that (as stated in *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U.S. 33, 46) "* * * it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of State tax burdens, merely

because an incidental or consequential effect of the tax is an increase in the cost of doing business."

The implication is that it was the purpose of the export-import clause to relieve those engaged in foreign commerce of their just share of State tax burdens merely because a tax increases the cost of doing business.

There are two cases in which the Court has, in effect, held that the original package doctrine does relieve a local taxpayer of his just share of local taxation.[9] But the basis of each of these decisions was that a property tax levied directly upon imported goods was a tax on imports and fell within the express prohibition of the Constitution. The taxes were not condemned merely because they increased the cost of doing business. Here the tax is levied upon the local privilege of selling tangible personal property at retail. Passage of title and delivery within the State determines whether the receipts from the sale shall be included in the measure of the tax. The tax incidentally increases the cost of doing a local business, but it does not affect the importation or exportation of merchandise in any other way, and it is not levied upon exportation or any part of the process.

[9] *Low* v. *Austin*, 13 Wall. 29; *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652. These cases are hereinafter discussed.

III. A Non-Discriminatory Tax on a Local Sale is Neither a Duty nor an Import on Exports Even if the Purchaser Exports the Goods

The California Sales Tax is imposed upon the privilege of conducting a retail business. The tax is measured by gross receipts from sales at retail. At the time of the sale Section 3 of the Retail Sales Tax Act [10] read in part as follows:

> "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the ~~sale~~ rate of . . . 3 per cent of the gross receipts of any such retailer from the sale of all such tangible personal property sold at retail in this State on and after July 1, 1935 * * *."

The California courts have repeatedly held that the tax is imposed upon the vendor and that a provision directing that the tax "shall be collected by the retailer from the consumer in so far as the same can be done" [11] merely directs the retailer to state the amount of the tax separately in quoting his price to the extent that he has the legal authority to do so.[12]

The act contains a number of exemptions none of which discriminate against goods of extra-state origin or against goods leaving the State in interstate or

[10] Stats. 1933, p. 2600, as amended by Stats. 1935, p. 1253. In 1943 the act was codified and the provision is now found in Revenue and Taxation Code, Section 6051.

[11] Retail Sales Tax Act, Section 8½, Stats. 1933, p. 2602; Revenue and Taxation Code, Sec. 6052.

[12] *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.*, 11 Cal. 2d 283; 79 Pac. 2d 380. *Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. 2d 156; 78 Pac. 2d 731, 117 A. L. R. 838; *de Aryan* v. *Akers*, 12 Cal. 2d 781; 87 Pac. 2d 695.

foreign commerce. There is a complementary use tax [13] which was held constitutional by this Court in *Felt and Tarrant Manufacturing Co.* v. *Gallagher,* 306 U.S. 62.

As stated above, while a sale is defined to include "any transfer of title or possession or both,"[14] the State Board of Equalization has by regulation excluded from the measure of the tax the receipts from transactions where title passes upon delivery to a common carrier, custom broker, or forwarding agent.[15]

The tax, therefore, applies only to sales which are consummated by delivery to the purchaser within the State.

As applied to such transactions the tax is not a "duty or impost on exports" in the ordinary sense in which that term is used.

If goods are taxed *as* exports or *because of* their intended exportation; or if the process of exportation itself is taxed there would be a violation of Article I, Section 10, Clause 2. It would also follow, necessarily, that commerce would be improperly burdened (See *Coe* v. *Errol,* 116 U.S. 517, 525-526). Indeed, it would seem to be too clear for argument that a duty on exports imposed by a State would be precluded by the

[13] Stats. 1935, p. 1297. In codifying the Sales and Use Tax Acts the provisions of the two acts were consolidated in Sections 6001-7176 of the Revenue and Taxation Code.

[14] Retail Sales Tax Act, Sec. 2b; Stats. 1933, p. 2599, as amended; Stats. 1939, p. 1256; Revenue and Taxation Code, Sec. 6006.

[15] Sales Tax Rules and Regulations No. 26; Appendix "B."

commerce clause as well as by the export-import clause.

The decisions of this Court to the effect that taxes on transactions such as that involved in the case at bar do not burden commerce, therefore, necessarily include a determination that the tax is not a duty on exports.

As we will demonstrate, the constitutional debates and the history of the interpretation of Article I, Section 10, Clause 2 by this Court support our position.

There are no cases dealing directly with the validity of a tax upon the privilege of selling at retail where the tax is measured exclusively by receipts from local sales. In the following discussion we have sometimes referred to the California tax as a tax upon the sale. However, sales at wholesale are not taxed, nor are casual sales at retail. Since the tax is imposed upon a local privilege and not upon the sale itself nor directly upon the receipts from the sale, it is one step further removed from commerce than the cases hereinafter discussed.

The privilege taxed in *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292, was that of selling at wholesale. The Indiana Gross Receipts Tax discussed in *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, was imposed upon the privilege of receiving gross receipts and all of the sales involved in that case were at wholesale.

The economic effect of a tax upon the business of selling at wholesale differs materially from a tax upon the privilege of selling at retail, for there are relatively few cases in which sales in interstate or foreign commerce are made directly to the consumer.

IV. The Constitutional Convention

While historians agree that the problem of the regulation of trade between the States and with foreign countries was one of the most important factors in the calling of the Constitutional Convention, the records of the constitutional debates revealed comparatively little regarding the discussion of the subject of the taxation of imports and exports.

The purpose of the inclusion of the prohibition against the taxation of exports was to protect the inland States from the levies by the coastal States.[16] But two of the leaders in the convention expressed the idea that the commerce clause would provide sufficient protection to the inland States. Madison's notes on the Convention state that Oliver Ellsworth of Connecticut saw no reason for the prohibition of the taxation of exports by the States, saying that "The power of regulating trade between the States will protect them against each other."[17] Madison himself is quoted as saying that "perhaps the best guard against the abuse of the power of the States on this

---

[16] *The Federalist* No. 42.
Farrand: The Record of the Federal Convention, Vol. 2, pp. 305-8, 359-363, 441-442, 589.
Woodruff v. *Parham*, 8 Wall. 123, 134.
[17] Farrand: supra, Vol. II, pp. 359-360.

subject, was the right in the General Government to regulate trade between State and State.[18]

It is apparent, however, that the inland States were not satisfied with these assurances and demanded the express prohibition of such levies. It is possible that they believed that the commerce clause did no more than to give Congress the power to forbid such taxes [19] or it may have been that they simply were uncertain as to how much protection the commerce clause would provide.

In any event there is nothing in the debates which shows that the members of the Convention thought that the export-import clause was to be construed to forbid the levy of any taxes which the Court has now held to be proper under the commerce clause.

In the debate upon the addition of the exception to the export-import clause ("except what may be absolutely necessary for executing its inspection laws") it was stated by Gouvernor Morris that he "did not consider the dollar per hogshead laid on tobacco in Virginia as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption."[20]

Thomas Fitzsimons likewise expressed the idea that nondiscriminatory excises did not amount to a duty on exports, saying, "Incidental duties on tobacco and

[18] Farrand, supra, Vol. II, p. 360.
[19] See Chief Justice Taney's opinions in the License cases (5 How. 573, 593) and in the Passenger cases (7 How. 597, 60[illegible]).
[20] Farrand, supra, Vol. II, p. 589.

flour never have been and never can be considered as duties on exports."[21]

It would seem that if the exponents of States rights in the Convention had thought that the export-import clause would be interpreted to preclude the levy of nondiscriminatory excises, they would have objected vehemently to the provision. Actually the export-import clause received little attention even from such bitter opponents of the Constitution as Luther Martin.[22] No member of the Convention expressed the idea at any time that the export-import clause would preclude the levy of general taxes applicable alike to domestic and foreign goods.

V. Cases Dealing with the Taxation of Exports by the States

There are few cases in which this Court has passed squarely upon a question involving the application of Art. I, Sec. 10, Clause 2 to the taxation of exports.

In *Almy* v. *California*, 24 How. 169, it was held that a California tax on bills of lading, measured by the value of goods shipped in interstate commerce, was invalid. While the case was overruled in *Woodruff* v. *Parham*, 8 Wall. 123, insofar as it applied the export-import clause to interstate commerce, it is clear that that the tax was levied upon the movement of goods itself; that it burdened commerce and that it would

[21] Farrand: supra, Vol. II, p. 589.

[22] See "Genuine Information" published by Martin, December 12, 1787; Farrand: supra, Vol. III, pp. 172 to 233; particularly, pp. 215-216.

have been properly treated as a duty on exports if the goods had moved in foreign commerce.[23]

In *Brown* v. *Houston*, 114 U.S. 622, 629, the contention was made that coal at rest in New Orleans was exempt from taxation as an export since it was thereafter sold to steamers bound for foreign ports. On the tax day the coal was held for sale in New Orleans to whomsoever might desire to purchase it and the Court held that the general nondiscriminatory tax did not constitute a duty on exports. Mr. Justice Bradley speaking for the Court said:

> "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine."

The next case, in point of time, dealing directly with the taxation of exports by a State was *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292. However, in *Coe* v. *Errol*, 116 U.S. 517, 525-527, a case involving interstate commerce, the Court, again speaking through Mr. Justice Bradley, said:

> "Of course they can not be taxed *as* exports; that is to say, they can not be taxed by reason of or because of their exportation or because of their intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution which prohibits any

[23] Compare *Fairbank* v. *U.S.*, 181 U.S. 283, discussed, infra, p. 26.

State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall. 123, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one State to another, it can not be doubted that such an imposition would be a regulation of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan*, ante, 446, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? * * *.

"* * * such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

This case correctly limits the application of the export-import clause to cases in which the tax discriminates against exports, or taxes the actual movement of goods or taxes the goods themselves after their ultimate passage outside the State has commenced, or after their commitment to a common car-

rier.[24] It also demonstrates that those taxes which are forbidden by the export-import clause are also forbidden by the commerce clause.

Crew-Levick v. *Pennsylvania*, 245 U.S. 292, involved a tax on wholesalers measured by gross receipts which the Court described as a State tax imposed upon the business of selling goods in foreign commerce." The Court stated that while the question involved was dual in form it might "be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms."

The sales involved in that case were foreign sales. This necessarily means that in that case the purchaser did not come into the State of Pennsylvania to take delivery of the goods.

The *Crew-Levick* case was followed in *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, where the Court held that the commerce clause forbade the taxation of the gross receipts of commerce whether the sales were made in interstate or foreign commerce. The export-import clause was not relied upon by the taxpayer in that case. It is apparent that in that case also the purchasers did not come into the State to accept delivery.

There are, therefore, but three cases in which the Court has held that a State tax constitutes a duty on

[24] Appellant states that the case holds that an immunity attaches to goods exported "upon their first movement towards the sea." We find no such language in the Court's opinion.

exports. In each case the Court has reached the same result as it would have reached had the commerce clause alone been relied upon by the taxpayer.

Furthermore, in *Coe* v. *Errol,* supra, the Court clearly stated that a duty or tax upon an export would necessarily be a burden or regulation of commerce. While in a sense this statement may be said to be dictum, it was actually made as a step in the Court's reasoning. The Court, in substance, determined that the tax in question was not a tax on an export and concluded, therefore, that it did not burden commerce.

Appellant relies upon *Blount* v. *Munroe* (1878), 60 Ga. 61, 68, and *Clarke* v. *Clarke* (1877), 3 Woods 408, Fed. Case No. 2846. Both cases were decided prior to the decisions in *Brown* v. *Houston,* supra (114 U.S. 622), and *Coe* v. *Errol,* supra (116 U.S. 517), and appear to be contrary to those decisions.

In each of those cases the logs were in the possession of the exporter and the exporter was an alien engaged solely in the business of exporting logs. Contracts had been made for the sale of all of the logs and some of the logs purchased that season had actually been shipped prior to the tax day. The conclusion that the goods had been separated from the general mass of property on the tax day is, however, inconsistent with the decision in *Coe* v. *Errol,* supra.

VI. Cases Involving the Taxation of Exports by the United States and Their Relation to the Commerce Clause Cases

The first case of importance applying Article I, Section 9, Clause 5 of the Constitution is *Turpin* v. *Burgess,* 117 U.S. 504. The decision there was based upon two grounds. It was held that the tax involved was not a tax on articles at all but the Court continued to hold that even if the tax involved were treated as a tax on goods which were exported it was valid. The Court observed that the prohibitions upon the taxation of exports by the States and the Federal Government were substantially the same and it relied upon *Coe* v. *Errol* as establishing the proposition that a nondiscriminatory tax levied upon events occurring prior to exportation was not a duty or import on exports. The Court said (117 U.S. 504, 507):

> "It is true, as was conceded in Coe v. Errol, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imports or duties are laid on imports and exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

In *Fairbank* v. *United States,* 181 U.S. 283, the Court held that an act of Congress imposing a tax on bills of lading was unconstitutional as being levied directly on the process of exportation.. Among the cases relied upon was *Robbins* v. *Shelby County,* 120 U.S. 489, a leading case in the field of interstate commerce. The Court rejected the argument made by the Solicitor General that the history of the constitutional debates disclosed that the purpose of Article I, Section 9, Clause 5 was merely to prevent the levy of excises on particular kinds of articles which would prove discriminatory because the articles were exported from only a few States. It held, rather, that a tax levied directly upon the process of exportation was a tax on "articles exported."

The *Fairbank* case was followed in *United States* v. *Hvoslef,* 237 U.S. 1, and *Thames and Mersey Ins. Co.* v. *United States,* 237 U.S. 19. The *Hvoslef* case involved a Federal tax on charter parties and the *Thames and Mersey* case a tax on ocean marine insurance. In each case the Court held that the tax fell directly upon the process of exportation and was, therefore, invalid. Again strong reliance was placed upon *Robbins* v. *Shelby County,* supra, the Court expressing the view that a tax burdening exportation was forbidden in much the same manner as were State taxes burdening commerce.[25]

[25] For a criticism of these three cases see Goodwin: *United States* v. *Hvoslef.* A Constitutional Source of National Revenue Impaired, 29 Harv. L. R. 469.

In *Cornell* v. *Coyne*, 192 U.S. 418, a tax on filled cheese was upheld as it applied to cheese which was exported. In this case, also, the Court referred to the analogy to the Commerce Clause and held that the manufacture of goods could be taxed because commerce did not begin until after manufacture was completed.[26]

In *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, a tax on baseballs and baseball bats was held invalid as applied to equipment sold to a Venezuelan firm through a New York commission merchant. A tax equivalent to 3 per cent of the selling price was imposed upon sporting goods "sold by the manufacturer, producer or importer." Scholtz & Co., the commission merchant, pursuant to an order received from a Venezuelan firm, purchased baseballs and baseball bats from the taxpayer. Scholtz & Co. paid the taxpayer for the goods and was thereafter reimbursed by the foreign purchaser. The goods were delivered directly to the dock by the taxpayer and did not come into the possession of the commission merchant at any time. The Court treated the transaction as a single sale and emphasized that the purchase by Scholtz & Co. was solely for the purpose of the ultimate purchaser and for its account and risk. In reaching its conclusion the Court relied primarily upon *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U.S. 336, and *Texas & New Orleans R. R. Co.* v. *Sabine Tram Company*, 227 U.S. 111, cases involving

[26] Compare *American Manufacturing Co.* v. *St. Louis*, 250 U.S. 459.

the power of Congress to regulate interstate commerce.

In *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, a case involving the application of the commerce clause to a transaction similar to that in the case at bar, Mr. Justice Holmes distinguished the *Spalding* case stating that the delivery direct to the purchaser marked the difference between that case and the *Spalding* case. There is no question but that Justice Holmes considered the holding in the *Spalding* case applicable to cases arising under the commerce clause and that he treated the question arising under the two clauses as identical.

In his brief the Solicitor General took the position that Article I, Section 9, Clause 5 did not preclude the levy of nondiscriminatory taxes and that none of the cases decided under the commerce clause were controlling. He failed to point out to the Court that the Texas railroad cases upon which counsel for the taxpayer, and the Court, relied involved the power of Congress to regulate commerce rather than the power of the States to tax events related to commerce.

This distinction was clearly pointed out in *Minnesota* v. *Blasius*, 290 U.S. 1, 8, where the Court speaking through Chief Justice Hughes said:

> "But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a nondiscrimina-

tory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford* v. *Wallace,* (258 U.S. 495), supra, pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon* v. *Illinois,* 227 U.S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford case quoted from the opinion in the Bacon case (supra, p. 516) the following statement of distinction: 'The question' (that is, as to the validity of the state tax) 'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority'."

This same distinction was noted by the Court speaking through Mr. Justice McKenna in *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665, where the Court upheld a tax on coal stored in a New Jersey yard while en route from Pennsylvania to New York.[27]

There was a period during which the Court seldom referred to this distinction. In a series of cases involving the taxation of personal property in transit, the

[27] Mr. Justice McKenna was also the author of the opinions in *Texas & New Orleans Railroad Company* v. *Sabine Tram Company,* supra, (227 U.S. 111) and *Railroad Commission of Louisiana* v. *Texas & Pacific Railway Co.,* 229 U.S. 336. All three cases were decided during the October 1912 term. *Bacon* v. *Illinois,* 227 U.S. 504, which also involves the taxation of personal property in transit, was decided at the same term and *Banker Brothers* v. *Pennsylvania,* 222 U.S. 210, which upheld a sale tax imposed by the buyer's state, was decided during the October 1911, term. The holding that Congress had power to regulate shipments within a State where a subsequent foreign shipment was merely anticipated was not therefore intended to cut off the power of the State to tax the goods when the first movement commenced.

Court, speaking through Chief Justice Taft, assumed that the regulatory cases were controlling.[28] The *Spalding* case was decided during this period. There is nothing in the opinion which would support the view that the Court intended to lay down a rule to the effect that different principles are to be applied in deciding whether a tax was levied on exports themselves than those applied in determining whether a tax improperly burdens commerce.

Unquestionably the case would have been decided the same way if a State tax had been involved and the goods had gone to Florida instead of Venezuela.

The Court said:

> "To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. *As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary.* In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. *Cornell* v. *Coyne*, 192 U.S. 418. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245. On the other hand no one would doubt that they were exempt

---

[28] *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U.S. 366; *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 474; *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 106-108. In the latter case the State Court distinguished the regulatory cases (166 La. 378; 117 So. 432) on the basis here stated, but the point is not mentioned in this Court's opinion. The Minnesota Supreme Court was then convinced that the cases involving regulation were controlling (*State* v. *Blasius*, 187 Minn. 420; 245 N.W. 612), It learned of its error in *Minnesota* v. *Blasius*, supra, 290 U.S. 1.

after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun." (Emphasis added.)[29]

In *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395, the Court, again speaking through Mr. Justice Holmes, said:

"The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts. *We may admit that this case is near the line.* There was a regular course of business known to the appellant, that took the gasoline into another State, and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, (a case of foreign export, see *Sonneborn Brothers* v. *Cureton*, 262 U.S. 506, 520, 521). But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." (Emphasis added.)

In drawing a line between deliveries to the purchaser and deliveries to a common carrier the Court

[29] *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 69.

intended to lay down a rule applicable to foreign and interstate commerce alike.

Appellant also relies upon *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90. In that case it was held that a tax on the business of loading and unloading ships was a regulation of commerce. Appellant argues that the case holds that the loading of ships is commerce and that therefore a tax on sales consummated by delivery to a ship is forbidden. If Appellant is correct, the *Puget Sound* case and the *Wood Preserving* case are irreconcilable for there can be no distinction between the loading of ships and the loading of railroad cars, and the *Puget Sound* case involves the application of the commerce clause not the export-import clause.

The distinction between the *Puget Sound* case and the case at bar lies in the difference in the things taxed. In the one case the transfer of the goods from dock to ships was taxed. In this case the tax is on the sale, the privilege of selling within the borders of the State, and the word "sale" is defined by statute to include the transfer of title or possession or both. The tax is measured by the receipts from the sale rather than by the receipts from loading or unloading. Furthermore, it is conceivable that a tax on loading and unloading could be used as a device to hamper interstate and foreign commerce while it is clear that the tax involved here could not be so used.

The Court's statement in the *Puget Sound* case that the loading and unloading of ships "is commerce"

is, in any event difficult to reconcile with the holdings of later cases.[30]

VII. Cases Involving the Taxation of Imports by the States

In *Brown* v. *Maryland,* 12 Wheat. 419, the Court held that a tax levied upon the occupation of importer was invalid. The Court based its decision upon both the commerce clause and the export-import clause. Since the tax was discriminatory there is no question but that it was a regulation of commerce as well as being, in substance, a tax on imports. However, in the course of its opinion the Court announced the "original package" doctrine.

In two cases the Court has applied this doctrine to hold invalid nondiscriminatory property taxes on goods while they remained in the original package.[31] In a number of other cases the Court has assumed that the doctrine was generally controlling but has held that in the particular case it was not applicable,[32] but there are no other cases which actually apply the original package doctrine to invalidate a tax which would not have been held invalid under the commerce clause.

In neither *Low* v. *Austin,* supra, nor *Hooven & Allison* v. *Evatt,* supra, did the Court recognize that the original package doctrine was enunciated as dic-

[30] Compare: *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250; *Department of Treasury* v. *Wood Preserving Corp.,* supra, 313 U.S. 62, and see *Joseph* v. *Carter & Weekes Stevedoring Co. No. 29,* October, 1946, term.

[31] *Low* v. *Austin,* 13 Wall. 29; *Hooven & Allison* v. *Evatt,* 324 U.S. 652.

[32] *Waring* v. *The Mayor,* 8 Wall. 110; *May* v. *New Orleans,* 178 U.S. 496; *Austin* v. *Tennessee,* 179 U.S. 343; *Burke* v. *Wells,* 208 U.S. 14, *Gulf Fisheries* v. *MacInerney,* 276 U.S. 124.

tum, insofar as it applied to nondiscriminatory taxes, and in neither case did the Court consider the language of the constitutional provision or the history of the constitutional debates.

On the other hand it has been noted by the Court in a number of other cases, that the tax involved in *Brown* v. *Maryland*, supra, was a discriminatory tax[33] and there is even a question as to whether Chief Justice Marshall intended that the doctrine should apply to nondiscriminatory taxes.

After stating that the Courts supposed the principles laid down to apply equally to importations from sister States, the Court said (12 Wheat. 419, 449);

> "We do not mean to give any opinion on a tax discriminating between foreign and domestic articles."

The tax actually involved was discriminatory and it is apparent that if a nondiscriminatory tax were invalid it would necessarily follow that a discriminatory tax would likewise fall. It therefore seems possible that the word "not" was inadvertently omitted from the sentence by the reporter in his report of the opinion.

Further support for this view is found in the following discussion of the right of the States to tax related occupations. Chief Justice Marshall said:

> "The counsel for the defendant in error have endeavored to illustrate their proposition, that the

[33] *Welton* v. *Missouri*, 91 U.S. 275; *Cook* v. *Pennsylvania*, 97 U.S. 566; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218, 238 (dissenting opinion).

constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of dutes, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. . . .

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. . . .

"So, if he sells by auction. *Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right*

of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way." (Emphasis added).[34]

The italicized language indicates that Marshall would have had no objection to a nondiscriminatory tax levied upon a privilege closely related to interstate or foreign commerce such as the tax upon the privilege of selling at retail. . . .

Marshall's dictum has of course been repudiated in so far as it was thought to apply to nondiscriminatory taxes on goods which have completed an interstate journey. In such cases the Court has frequently said that the original package doctrine applies to imports from foreign countries, but such statements were not necessary to the decision.[35]

In *Cook* v. *Pennsylvania*, 91 U.S. 566, the tax involved was discriminatory. Auctioneers selling imported goods were taxed at a higher rate than auctioneers selling domestic goods. The tax was expressly held to be invalid upon the ground that it was discriminatory.[36]

In *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218, both the commerce clause and the export-import clause were relied upon in holding a franchise tax invalid as measured by the value of imported goods which remained in their original packages

[34] 12 Wheat. 419, 442.

[35] *Woodruff* v. *Parham*, supra; *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506.

[36] Marshall's dictum to the effect that a non-discriminatory tax on auctioneers would be valid is consistent with this case.

(Justices Cardozo, Brandeis and Stone dissenting.) The Court said (p. 225):

> "The question whether, consistently with the import and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance, for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign commerce. *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292, 295."

In *Hooven & Allison* v. *Evatt*, supra, 324 U.S. 652, the brief filed by the Attorney General of Ohio did not present the point that the export-import clause did not forbid the imposition of nondiscriminatory taxes on goods even while they remained in their original packages. As a result *Low* v. *Austin*, supra, 13 Wall. 29, has never been reexamined.[37]

There are, therefore, but two cases in which the Court has held a tax to be invalid upon the basis of the export-import clause where the same tax would not have been held invalid under the commerce clause. Each of these cases was based upon the application of the original package doctrine as it was expounded in *Brown* v. *Maryland*, supra. Neither one explains how it could be possible that a duty or tax on imports would not at the same time be an improper burden on commerce.

[37] For a discussion of the decision in *Hooven & Allison* v. *Evatt*, see 58 Harv. L. R. 858; 45 Col. L. R. 661; 20 Ind. L. J. 320.

There are, on the other hand, a number of cases in which the Court has stated expressly that the two clauses impose substantially the same prohibition.[38]

Appellant asks the Court to extend the rule applied in *Low* v. *Austin*, supra, to exports. It argues that the Court has held some taxes to be duties on imports although they do not burden commerce and that the Court should, therefore, hold some taxes to be duties on exports although it is plain that such taxes do not burden commerce. The Court, we submit, rejected this contention in *Coe* v. *Errol*, (116 U.S. 517. See the discussion, supra, pp. 21-22).

The application of a counter part of the original package doctrine to exports is not warranted in view of the doubts as to the soundness of the doctrine itself and it is not required by the doctrine of *stare decisis* or by any other legal principle.

In any event such an application would hardly assist appellant since it is plain that in this case the purchaser and not the Appellant was the exporter.[39] Since sales by one who buys from an importer may be taxed,[40] it would seem to follow that one who sells to the exporter may be taxed on his sales.

---

[38] *Brown* v. *Maryland*, supra; *Crew-Levick* v. *Pennsylvania*, supra; *Coe* v. *Errol*, supra; *Anglo. Chilean Nitrate Co.* v. *Alabama*, supra.

[39] *Krauter* v. *Menchacattorre*, 195 N.Y.S. 361, 363, and compare *Hooven & Allison* v. *Evatt*, 324 U.S. 652.

[40] *Waring* v. *The Mayor*, 8 Wall. 110.

CONCLUSION

The California Sales Tax is imposed upon the privilege of selling tangible personal property at retail within the borders of the State. The inclusion of receipts from local sales in the measure of the tax is not forbidden by the export-import clause merely because the purchaser thereafter takes the goods to another State or country.

This Court has repeatedly held that a sale consummated by delivery to the purchaser in the seller's State is a local event. The export-import clause does not preclude the taxation of such sales nor the inclusion of the receipts from such sales in the measure of a tax levied upon the privilege of making local retail sales.

It is respectfully submitted that the judgment of the California Supreme Court is correct and that it should be affirmed.

ROBERT W. KENNY,
Attorney General of the
State of California,

JOHN L. NOURSE,
Deputy Attorney General of
the State of California,
Counsel for Appellee.

APPENDIX A

Retail Sales Tax Act

SECTION 2(b)

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

(Stats. 1933 p. 2599 as amended Stats. 1935 p. 1256.)

(Revenue and Taxation Code, Sec. 6006.)

SECTION 3

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter pro-

vided and shall be in addition to any and all other taxes.

(Stats. 1933 p. 2600 as amended Stats. 1935 p. 1253.)
(Revenue and Taxation Code, Section 6051.)

SECTION 5(a)

The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(Stats. 1933 p. 2601.)
(Revenue and Taxation Code, Sec. 6352.)

SECTION 8

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(Stats. 1933 p. 2602.)
(Revenue and Taxation Code, Sec. 6053.)

SECTION 8½

The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force

and effect and shall be as completely operative as though this section had not been included herein.

(Stats. 1933 p. 2602.)

(Revenue and Taxation Code, Sec. 6052.)

SECTION 12

Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporaton, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Any person who engages in the business of selling tangible personal property at retail in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor.

(Stats. 1933 p. 2603.)

(Revenue and Taxation Code, Sec. 6066, 6071.)

SECTION 17

The burden of proving that a sale of tangible personal property is not a sale at retail shall be upon the person who makes it, unless such person takes from the purchaser a certificate to the effect that the property is purchased for resale. Such certificate relieves the seller from such burden only if taken in good faith from a person engaged in the business of selling tangible personal property and holding the permit provided for in section 12 of this act and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether such property will be sold or will be used for some other purpose. Such certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to such purchaser under this act, and shall indicate the general character of the tangible personal property sold by such purchaser in the regular course of business. Such certificate shall be substantially in such form as the board may prescribe.

If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the

rental charged rather than the cost of the property to him.

For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the board is not satisfied with the return or returns of tax made by any retailer, it is hereby authorized and empowered to make an additional assessment of tax due from such retailer based upon the facts contained in the return or returns, or upon any information within its possession or that shall come into its possession. An additional assessment may be made of the amount of tax due for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods, together with interest on such overpayments, against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in sections 9½ and 23 hereof. If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of 10 per cent of the amount of the additional assessment shall be added thereto. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of 25 per cent of the

amount of the additional assessment shall be added thereto. The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears in the records of the board.

(Stats. 1933 p. 2604 as amended Stats. 1939 p. 2175)

(Revenue and Taxation Code, Sec. 6091-6094; 6481-6486.)

SECTION 21

Except in case of a fraudulent return or neglect or refusal to make a return or claim for additional tax pursuant to section 20 hereof, every notice of additional tax proposed to be assessed hereunder shall be mailed to the retailer within three years after the fifteenth day of the calendar month following the quarterly period for which the tax is proposed to be assessed or within three years after the return is filed, whichever period expires the later.

(Stats. 1933 p. 2606 as amended Stats. 1935 p. 1261, Stats. 1939 p. 2178.)

(Revenue and Taxation Code, Sec. 6487.)

SECTION 23

If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes

then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fifteenth day after the close of the quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessment became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder. Within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

Interest shall be computed, allowed and paid upon any overpayment of any tax, at the rate of one-half of 1 per centum per month as follows:

(1) From the fifteenth day of the calendar month following the quarterly period for which the overpayment was made but no refund or credit shall be made of any interest imposed upon the claimant with respect to the tax being refunded or credited.

(2) In the case of a refund, to the fifteenth day of the calendar month following the date upon which the

claimant is notified by the board that a claim may be filed or that the claim has been certified to the State Board of Control, whichever date is the earlier.

(3) In the case of a credit to the same date that interest is computed on the tax against which the credit is applied.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the County of Sacramento, in the name of the people of the State of California and such action shall be tried in the County of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied, the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of the tax upon the records of the board.

If the board determines that any overpayment of tax has been intentionally made or made by reason of carelessness, it shall not allow any interest thereon.

(Stats. 1933 p. 2606 as amended Stats. 1941 p. 1328.)

(Revenue and Taxation Code, Sec. 6901-6908; 6961-6963; 6981.)

SECTION 31

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection

under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act or under the California Use Tax Act of 1935, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of 6 per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by

not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the board to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax.

(Stats. 1933 p. 2610 as amended Stats. 1939 p. 2184.)
(Revenue and Taxation Code, Sec. 6931-6937.)

APPENDIX B

Sales Tax Rule No. 26

INTERSTATE AND FOREIGN COMMERCE

The California retail sales tax does not apply to gross receipts from sales made in interstate or foreign commerce.

Exempt Transactions

A sale is made in interstate or foreign commerce if:

(a) The property is shipped pursuant to the contract of sale from a point outside this State directly to the purchaser in this State, or to the retailer's agent in this State and redelivered by the agent to such purchaser.

(b) The property is imported into this State from a foreign country and sold by the importer in the original package in which imported.

(c) The property is shipped to a point outside this State, pursuant to the contract of sale either through (1) delivery by the retailer to such point, (2) delivery by the retailer to a carrier for shipment to a consignee at such point or (3) delivery by the retailer to a custom's broker or forwarding agent for shipment outside this State.

Taxable Transactions

A sale is not made in interstate or foreign commerce if:

(a) The property is shipped from a point outside this State to the retailer in this State and redelivered by the retailer to the purchaser here, the retailer being an independent dealer and not the agent of an out of State retailer.

(b) The property is sold and delivered to the purchaser or his representative in this State, even though the disclosed or undisclosed intention of the purchaser is to transport the property outside the State and the property is subsequently so transported.

(c) The property is shipped from a point in this State to another point in this State over a route a portion of which is outside the State.

PROOF. ACTUAL OUT-OF-STATE SHIPMENT ESSENTIAL

Bills of lading or other documentary evidence of the delivery of property to a carrier, custom's broker or forwarding agent for shipment outside the State must be retained by the retailer to establish the character of the transaction. If upon investigation, it is disclosed that the property was diverted in transit or for other reasons was not actually delivered outside the State, the retailer selling the property must pay the tax upon the gross receipts from the sale thereof, even though he has obtained bills of lading or other documentary evidence of delivery of the property to a carrier for shipment outside the State.

O

Rp. 7, 12

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1946.

Richfield Oil Corporation, Appellant, v. State Board of Equalization. } Appeal from the Supreme Court of the State of California.

[November 25, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on appeal from the Supreme Court of California which sustained a California tax against the claim that it was repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States. Judicial Code § 237, 28 U. S. C. §§ 344 (a), 861a.

Appellant is engaged in producing and selling oil and oil products in California. It entered into a contract with the New Zealand government for the sale of oil. The price was f. o. b. Los Angeles, payment in London. Delivery was "to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. Nucula at Los Angeles, California." The oil was to be consigned to the Naval-Officer-In-Charge, Auckland, New Zealand. Appellant carried the oil by pipe line from its refinery in California to storage tanks at the harbor where the Nucula appeared to receive the oil. When the Nucula had docked and was ready to receive the oil, appellant pumped it from the storage tanks into the vessel. Customary shipping documents were given the master, including a bill of lading which designated appellant as shipper and consigned the oil to the designated naval officer in Auckland. Payment of the price was made in London. The oil was transported to Auckland, no portion of it being used or consumed in the United States. Appellant filed with the Collector of Customs a shipper's export declaration. It did not collect, nor attempt to do so, any sales tax from the purchaser.

Appellee assessed a retail sales tax against appellant measured by the gross receipts from the transaction. The tax was paid under protest, a claim for refund was filed asserting that the levy of the tax violated the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, and this suit was brought to obtain a refund. The California Supreme Court, one justice dissenting, first allowed a recovery on that ground. 155 P. 2d 1. After a rehearing it reversed its position and held the tax constitutional, two justices dissenting. 27 Cal. 2d 150, 163 P. 2d 1.

I. We are met at the outset with the question whether the judgment of the California Supreme Court is a "final judgment" within the meaning of the Judicial Code § 237, 28 U. S. C. § 344 (a). The case was tried on the pleadings and stipulated facts, a jury having been waived. The trial court found for appellant. The Supreme Court ordered that the judgment "be and the same is hereby reversed." The argument is that under California law where a judgment has been reversed without directions, there is a new trial; that on a new trial appellant might amend its complaint and produce other evidence; and that if a new trial were had, new or different findings of fact might be made. See *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 61 P. 2d 756.

The designation given the judgment by state practice is not controlling. *Department of Banking* v. *Pink*, 317 U. S. 264, 268. The question is whether it can be said that "there is nothing more to be decided" (*Clark* v. *Williard*, 292 U. S. 112, 118), that there has been "an effective determination of the litigation". *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551; see *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–24. That question will be resolved not only by an examination of the entire record (*Clark* v. *Williard*, *supra*) but, where necessary, by resort to the local law to determine what effect the

judgment has under the state rules of practice. *Brady* v. *Terminal Railroad Assn.*, 302 U. S. 678; *Brady* v. *Southern Ry. Co.*, 319 U. S. 777. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005.

This suit is brought under the California Retail Sales Tax Act, § 23 and § 31, which prescribes the sole remedy for challenging the tax. The procedure prescribed is payment of the tax, the filing of a claim for refund which sets forth "the specific grounds upon which the claim is founded", Cal. Stats. 1941, pp. 1328, 1329, and, in case the claim is denied, the institution of a suit within ninety days "on the grounds set forth in such claim." Cal Stats. 1939, pp. 2184, 2185. The claim thus frames and restricts the issues for the litigation. Although the Supreme Court reversed the judgment of the trial court without direction, its decision controls the disposition of the case. See *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Bank of America* v. *Superior Court*, 20 Cal. 2d 697, 128 P. 2d 357. Since the facts have been stipulated [1] and the Supreme Court

---

[1] In California a valid stipulation is binding upon the parties. *McGuire* v. *Baird*, 9 Cal. 2d 353, 70 P. 2d 915; *Webster* v. *Webster*, 216 Cal. 485, 14 P. 2d 522; see 23 Cal. Juris. 826. It is available at a second trial unless in terms otherwise limited, *Nathan* v. *Dierssen*, 146 Cal. 63, 79 P. 739; *Crenshaw* v. *Smith*, 74 A. C. A. 295, 168 P. 2d 752; see 100 A. L. R. 775, and will be controlling at the second trial unless the trial court relieves a party from the stipulation. *First National Bank* v. *Stansbury*, 118 Cal. App. 80, 5 P. 2d 13. Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation. *Sacre* v. *Chalupnik*, 188 Cal. 386, 205 P. 449; *Back* v. *Farnsworth*, 25 Cal. App. 2d 212, 77 P. 2d 295; *Sinnock* v. *Young*, 61 Cal. App. 2d 130, 142 P. 2d 85; see 161 A. L. R. 1163. In the present case there is no intimation in the record or briefs of fraud, excusable neglect, or other ground for relief. Indeed the parties both accept the stipulation as accurate and complete.

of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided. The jurisdictional objection is thus without merit. See *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136.

II. We turn then to the merits. Article I, Section 10, Clause 2 of the Constitution provides that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The Supreme Court of California held that this provision did not bar the tax because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation. The court suggested, and the appellee concedes, that a different result might follow if the oil had been delivered to a common carrier; "for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation." 27 Cal. 2d p. 153, 163 P. 2d p. 3. The court, in reaching the conclusion that the tax was constitutional, rested in part on our recent decisions (particularly *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340) which sustained the levy of certain state taxes against the claim that they violated the Commerce Clause. The court concluded that if this had been an interstate transaction, it would have been subject to the tax. It saw no greater limitation on the power of the States under Article I, Section 10, Clause 2.

than this Court has found to exist under the Commerce Clause.

We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2.

The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. *Brown* v. *Maryland*, 12 Wheat. 419; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 665-66, and cases cited. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. —. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort "to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed." That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of

the cost of the local government from which it receives benefits (see e. g. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254–55, and cases cited; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Nippert* v. *Richmond*, 327 U. S. 416.

It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying "any" tax on imports or exports without the consent of Congress. Only one exception is created—"except what may be absolutely necessary for executing it's inspection Laws". The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against "any" tax a prohibition against "any discriminatory" tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other.

It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. Support for that is found in the fact that this provision was defended in the Convention [2] and later in the debates [3] on the ground that it protected the inland States from levies by the coastal

[2] See 2 Farrand, The Records of the Federal Convention (1911), pp. 307, 359–62, 442.

[3] See particularly Madison's statement, 3 Elliot's Debates (2d ed.) p. 483. And see The Federalist No. 42.

States through the taxation of exports. Yet that function was only a phase of a larger design. The Import-Export Clause was considered in connection with Article I, Section 9, Clause 5, which provides that "No Tax or Duty shall be laid on Articles exported from any State."[4] The purpose was to withhold from Congress the power to tax exports,[5] and to deprive any State of the power except with the consent of Congress and even then, it seems, to require the net proceeds to be paid into the federal treasury.[6] A proposal was made to prohibit the States "from taxing the produce of other States exported from their harbours."[7] But that suggestion was not followed. The language adopted was supported by Madison "as preventing all State imposts".[8] The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution. As stated by Chief Justice Marshall in *Sturges* v. *Crowinshield*, 4 Wheat. 122, 202, "it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation." For, as Chief Justice Taney said in *Holmes* v. *Jennison*, 14 Pet. 540, 570–71:

---

[4] See 2 Farrand, op. cit., supra, note 2, pp. 305–08, 358–63, 441–42.

[5] The consensus of opinion was expressed by Gerry—that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it." See 2 Farrand, op. cit., supra, note 2, p. 307. Or as stated by Sherman, "A power to tax exports would shipwreck the whole." Id., p. 308.

[6] See note 1, supra.

[7] This was suggested by Langdon. See 2 Farrand, op. cit., supra, note 2, p. 361.

[8] See 2 Farrand, op. cit., supra, note 2, p. 442.

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning;"

We cannot, therefore, read the prohibition against "any" tax on exports as containing an implied qualification.

The questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it.

The requirement that foreign commerce be involved (*Woodruff* v. *Parham*, 8 Wall. 123, 136) is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem. In *Brown* v. *Houston*, 114 U. S. 622, Louisiana taxed coal held in that State for sale. After the tax was assessed some of the coal was sold for export. The Court held that the coal when taxed was not an export, saying, pp. 629–30:

> "When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when

falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

In *Coe* v. *Errol*, 116 U. S. 517, the Court had before it a case under the Commerce Clause. Logs, cut in New Hampshire, were being held on a river there for transportation to Maine. New Hampshire's non-discriminatory tax on them was sustained. What the Court said concerning commerce is what we deem to be the correct principle governing exports: ". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." P. 527.

That view has been followed in cases involving Article I, Section 9, Clause 5 of the Constitution, which, as we have noted, prohibits Congress from laying any tax on "Articles exported from any State." In *Turpin* v. *Burgess*, 117 U. S. 504, the Court sustained a federal excise tax on manufactured tobacco. The tax was laid upon the goods before they left the factory. The Court said, p. 507, "They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer." The same result was reached in *Cornell* v. *Coyne*, 192 U. S. 418, where a federal manufacturing tax on filled cheese was sustained against the claim that it was a tax levied by Congress on exports. The cheese was manufactured under contract for export. The Court said, "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption

attaches to the export and not to the article before its exportation." P. 427.

That line has been marked by other decisions under Article I, Section 9, Clause 5 of the Constitution. Thus a federal stamp tax on a foreign bill of lading is a tax on exports, since it is the equivalent of a direct tax on the articles included in the bill of lading. *Fairbank* v. *United States*, 181 U. S. 283. The same is true of federal stamp taxes on charter parties made exclusively for the carriage of cargo in foreign commerce. *United States* v. *Hvoslef*, 237 U. S. 1, 17, for a tax on those charter parties is "in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." The same is likewise true of federal stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19. The Court stated, p. 27:

> "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process."

Closer in point is *Spalding & Bros.* v. *Edwards*, 262 U. S. 66. It involved a federal tax on baseball bats and balls sold by the manufacturer. A Venezuela firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with the manufacturer instructing it to deliver the packages to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were transported to Venezuela. The issue, as stated by the Court, p. 68, was "whether the sale was a step in exportation". The Court pointed out that the goods would not have been exempt

from tax while they were "in process of manufacture" though they were intended for export but that they would be exempt "after they had been loaded upon the vessel for Venezuela and the bill of lading issued." The question was whether the "export had begun." After noting that title passed when the goods were delivered into the carrier's hands, the Court stated, pp. 69–70:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

The circumstance that title was in the New York commission house and that it might change its mind and retain the goods for its own use was dismissed by the statement that "Theoretical possibilities may be left out of account." P. 70. The Court concluded that if exportation was put at a later point, exports would not receive "the liberal protection that hitherto they have received". P. 70.

This line of cases was summarized in *Willcuts* v. *Bunn*, 282 U. S. 216, 228, as construing the constitutional prohibition against federal taxation of exports so as to give "immunity to the process of exportation and to the transactions and documents embraced in that process. . . . Only on that construction can the constitutional safeguard be maintained."

The fact that delivery to a common carrier for export gave the sale immunity in *Spalding & Bros.* v. *Edwards*, *supra*, is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, are relied upon as indicating that

delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was "in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would

---

[8] See *Carson Petroleum Co. v. Vial*, 279 U. S. 95.

not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.

It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of "export" is the same under that Clause and the Import-Export Clause (see *Brown* v. *Maryland*, *supra*, p. 445; *Turpin* v. *Burgess*, *supra*, p. 506), the same result follows here.

It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. The tax is measured by the gross receipts of retail sales and is levied on retailers "For the privilege of selling tangible personal property at retail". Cal. Stats. 1935, p. 1253. The retailers are authorized to collect the tax from the consumers. Cal. Stats. 1933, p. 2602. And a sale is "any transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property, for a consideration". Cal. Stats. 1935, p. 1256. The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal. 2d p. 152, 163 P. 2d p. 2.

That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect. See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City, F. S. & M. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231.

Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, no difference in substance between any tax so labeled and the present tax. The California Supreme Court conceded that the delivery of the oil "resulted in the passage of title, and the completion of the sale, and the taxable incident". 27 Cal. 2d p. 153, 163 P. 2d pp. 2–3. The incident which gave rise to the accrual of the tax was a step in the export process.

Moreover, *Brown* v. *Maryland*, *supra*, rejected an argument that while a State could not tax imports, it could tax the privilege of selling imports. Chief Justice Marhsall stated, p. 444:

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

The same reasoning was applied to exports, p. 445:

> "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United

> States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the aricle, and that the legislature had a right to tax occupations?"

The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. *United States* v. *Hvoslef, supra.* What was said there (p. 13) is equally applicable here: "If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it." And see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218.

We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional.

Reversed.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1946.

Richfield Oil Corporation, Appellant, *v.* State Board of Equalization.	Appeal From the Supreme Court of the State of California.

[November 25, 1946.]

Mr. Justice Black, dissenting.

Richfield Oil Corporation, while doing business in California, sold oil extracted from California soil. Its purchaser bought the oil to transport and use abroad. California, like many other states, raises a large proportion of its revenue by a generally applied tax on sales.[1] The Court holds that application of the California sales tax to this transaction is a "tax on exports" and therefore violates Article 1, Section 10, Clause 2 of the Federal Constitution. I cannot agree.

In *Spalding* v. *Edwards*, 262 U. S. 66, 69, a precedent upon which today's decision heavily relies, this Court said that "with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary." This principle announced in the *Spalding* case seems to follow what was said in *Cornell* v. *Coyne*, 192 U. S. 418, 427, that the constitutional prohibition against a tax on exports was not intended to relieve exported articles "from the prior

[1] In 1945 California's total revenue was $676,828,000. It collected $242,757,000 from its sales tax. *California State Finances in 1945*; *State Finances: 1945*, Dept. of Commerce, Bureau of the Census (1946) 33.

ordinary burdens of taxation which rest upon all property similarly situated." Every transaction held by this Court to have occurred *after* rather than *before* exportation began makes an encroachment not only on the power of states to tax, but, as the Court points out, the Federal Government's area of taxation is also narrowed. The result of such a holding is all the more serious because, unlike the consequences of holding a state tax invalid under the Commerce Clause, the prohibitions against taxing exports are, with a minor exception, permanent, absolute and unqualified. After today's ruling Congress itself can neither tax nor permit states to tax sales like the one here proscribed. To classify sales transactions as having occurred after exportation began therefore results in creating an island of constitutional tax immunity for a substantial proportion of the profitable business of the nation. Such a result not only grants tax immunity to many profitable businesses which share governmental protections from payment of their fair part of taxes; it also throws an unfair part of the tax burden on others. Since we cannot assume that the framers of the Constitution looked with favor on such consequences, we should, before classifying a transaction in such a way as to render a tax on it unconstitutional, give it the most careful factual scrutiny. We should not invalidate such a tax unless satisfied beyond doubt that it falls squarely and wholly within the area marked by the Constitution for tax exemption.

The economic consequences of such sales taxes are probably about the same as would flow from a property or severance tax applied to Richfield. For all three types of taxes would likely be reflected in an increased sales price of Richfield's oil. No one, I suppose, would think of saying that such a property or severance tax would be unconstitutional as a tax on exports. The reason would be that the taxable event clearly arose before and not after exportation began. This sales tax was no more applied after

export had actually begun than a property or severance tax would have been. The tax was not even levied on an exporter or an exporter's agent or broker. Richfield was neither. Its sale of local California goods was negotiated and completed wholly in California. This purely intrastate sale transaction cannot properly be held to have lost its intrastate pre-exportation status by reason of the fact that the parties did not intend "title to pass" until the oil was delivered at the purchaser's ship. For formal "passage of title" is not an adequate criterion for measuring a state's constitutional power to tax sales made within the state. Private parties are free to decide, so far as their own interests are concerned, when legal title shall be considered to "pass." But a state surely is not required by the Constitution to forbear from taxing that part of a sales transaction which precedes the particular moment the parties have arbitrarily selected for a conceptual transfer of title. Nor need a state withhold the exercise of its power to tax sales until an article is delivered or paid for. That delivery, perhaps the last step in executing this agreement to sell, happened to border on the imaginary line where the actual exporter took possession does not justify us in concluding that therefore the whole sales transaction occurred after exportation. Constitutional interpretations which make serious inroads into the power of both the States and the Federal Government to tax sales made by local businesses should not turn on fine legal concepts of when title passed or delivery occurred in relation to the beginning of exportation.

Concededly, as the Court points out, the Constitution prohibits imposition of state and federal "imposts and duties" on "exports." But the Constitution does not define in words what is an impost or tax on exports and what is not. It is well known that taxation of exports was primarily forbidden by the Constitution at the insistence of inland states which feared that seaboard states would exact

a tribute from all goods sold in the interior which were thereafter transported through ports en route to foreign destinations. It was not intended to bestow a bounty of blanket tax immunity upon all those who engaged in the production, processing, purchase, or sale of goods shipped abroad. There was no broad purpose of encouraging foreign commerce by making all these preliminary steps tax free. The motivation of this tax and its economic consequences plainly are not those which the writers of the Constitution condemned. This was no tax on goods from an inland state which came through California in transit after severance, processing, and sale had been completed. Nor was it a disguised tax on a product of California soil or manufacture imposed solely because the oil was intended for a foreign destination. The tax was nothing more than an effort of California to defray a part of the state's expenses by a uniform sales tax on all those businesses, including Richfield, which enjoyed California's natural resources, the labor of its people, and the services and protection of its government.

True, the tax would impose a burden on export commerce to the extent that it increased the export price of Richfield oil. But if a tax on export sales be unconstitutional for imposing such a burden, so is a property tax or a severance tax applied to Richfield's oil anywhere from well to consumer. For all these types of taxes would likely be reflected in the price of Richfield's oil. But the history and the evolution of the constitutional prohibition against taxation of exports manifest that there was no intention to subsidize either export businesses or foreign purchasers by any such broad immunity from state and federal taxation.

I cannot believe that it was the purpose of the Constitution to let all goods destined for shipment abroad escape uniformly applied state and federal taxes, nor that a state whose resources are depleted is powerless to enforce its

sales tax if the depleter sells to customers for immediate shipment for ultimate use in foreign countries. No persuasive evidence has been produced to indicate that those who wrote the Constitution thought in such terms or that they would have handicapped the state and federal taxing power in such a way. And no other sufficiently cogent reasons have been advanced to require a present interpretation which so disarranges, confuses, and handicaps the sales taxes of all the states.